

ROY GUITRON

VS.

Respondent

AND

Insurance Carrier

ORDER

Did claimant suffer personal injury by accident which arose out of and in the course of his employment with respondent? Respondent contends that claimant's injury, which occurred when claimant stood up at a work desk, was the result of day-to-day living and not compensable. Claimant argues the desk and chair used at work were different from

those that claimant used at home. Therefore, the injury was not the result of day-to-day living, but, instead, was specific to claimant's work with respondent.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the Order For Compensation should be reversed.

Claimant had worked for respondent for five years as a custodian performing mopping, sweeping, cleaning, picking up trash, moving furniture and performing other custodial duties. On March 3, 2008, claimant reported to work at 3:30 a.m. as was his custom. He performed his custodial duties until 8:30 a.m., at which time he went to a work computer to check his e-mail. After sitting at the computer for about 10 minutes, claimant rose from the chair, experiencing a sudden onset of pain as he did so. Claimant described it as "a lot of pain".¹ Claimant's pain was so severe that he went to the "custodial closet and laid down".² Claimant testified that the chair and computer desk were lower than the chairs and table he used at home. Plus, the computer chair did not have arms. Claimant acknowledged the chairs he uses when he eats at home also do not have arms, but testified that their backs are higher than the computer chair. Claimant also acknowledged that he would sit several times per day at home but only sat at the computer at work, and usually only once per day. He agreed he gets into and out of chairs at home more than at work.

Claimant's medical history is significant in that he suffered a low back injury several years before, undergoing a fusion at L4-5 in 2006. At the time of this injury, he was taking Percocet and Meloxicam, although the Meloxicam may have been for claimant's earlier work-related knee injury, the resulting knee surgery and subsequent knee swelling. Claimant acknowledged that he was having ongoing problems, with his back hurting him "a little bit" before this accident.³ He had been returned to work for respondent after the back surgery with a 35-pound weight restriction which respondent accommodated and claimant adhered to.

Claimant was asked whether his back pain level, from the time he arrived in the morning at 3:30 a.m. until he got up from the computer chair, stayed the same, increased or decreased. Claimant stated it stayed the same.⁴ He also testified that, while sitting at

¹ P.H. Trans. at 13.

² *Id.* at 9.

³ *Id.* at 7.

⁴ *Id.* at 12.

the computer, his back pain remained the same. It was when claimant rose from the chair that he suffered significant back pain.⁵

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.⁶

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁷

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁸

K.S.A. 2007 Supp. 44-508(d) defines "accident" as,

. . . an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.⁹

K.S.A. 2007 Supp. 44-508(e) states:

(e) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where

⁵ *Id.* at 13.

⁶ K.S.A. 2007 Supp. 44-501 and K.S.A. 2007 Supp. 44-508(g).

⁷ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁸ K.S.A. 2007 Supp. 44-501(a).

⁹ K.S.A. 2007 Supp. 44-508(d).

it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.¹⁰

It is true that claimant's injury occurred while he was at work for respondent. However, a very similar injury occurred in *Johnson*¹¹. In *Johnson*, the claimant injured her left knee when she simultaneously turned in her chair and attempted to stand while reaching for a file that was overhead. Claimant immediately experienced severe pain in her left knee, which would not straighten. The Kansas Court of Appeals, in reversing the Board's award of benefits, found claimant's activity to be a normal activity of day-to-day living. The *Johnson* Court provided a detailed analysis of accidents and how they must be "fairly traceable to the employment."¹² The Court cited *Poff*¹³ for the premise that standing and sitting are normal everyday activities.

Here, claimant's act of standing does not appear to be an act which would exclude it from the limitations of K.S.A. 2007 Supp. 44-508(e). Therefore, based on the logic of *Johnson*, the award of benefits by the ALJ should be reversed.

It is possible that this injury could be a natural consequence of claimant's earlier injury. But as that has not been claimed, this issue is not before the Board at this time.¹⁴

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁵ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

¹⁰ K.S.A. 2007 Supp. 44-508(e).

¹¹ *Johnson v. Johnson County*, 36 Kan. App. 2d. 786, 147 P.3d 1091, rev. denied 281 Kan. ____ (2006).

¹² *Id.* at 789.

¹³ *Poff v. IBP, Inc.*, 33 Kan. App. 2d 700, 106 P.3d 1152 (2005) .

¹⁴ *Logsdon v. Boeing Co.*, 35 Kan. App. 2d 79, 128 P.3d 430 (2006).

¹⁵ K.S.A. 44-534a.

CONCLUSIONS

Claimant has failed to prove that his accident arose out of his employment. Instead, it was the result of a normal activity of day-to-day living and, thus, not compensable under K.S.A. 2007 Supp. 44-508(e).

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order For Compensation of Administrative Law Judge Pamela J. Fuller dated April 7, 2008, should be, and is hereby, reversed.

IT IS SO ORDERED.

Dated this ____ day of June, 2008.

HONORABLE GARY M. KORTE

c: Robert A. Levy, Attorney for Claimant
Anton C. Andersen, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge